No. 90-1621

Supreme Court, U.S.
FILED
JUN 4 1991
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1990

VIRGINIA KNIGHT; EDMUND G. BROWN; WILSON RILES; RICHARD NEVINS; HOUSTON I. FLOURNOY; HAROLD J. POWERS,

Petitioners,

v.

BOARD OF ADMINISTRATION OF THE PUBLIC EMPLOYEES' RETIREMENT SYSTEM,

Respondent.

Petition For A Writ Of Certiorari To The Court Of Appeal Of The State Of California In And For The Third Appellate District

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether petitioners have a vested right to have their pension allowances calculated on the basis of the salary of incumbent office holders, and, if so, whether Article III, section 7 of the California Constitution unconstitutionally infringes this vested right.

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent Board of Administration of the Public Employee's Retirement System hereby submits its brief in opposition to the petition for writ of certiorari which seeks review of the unpublished decision of the Court of Appeal of the State of California for the Third Appellate District in this case, Appendix A to the Petition.

STATEMENT OF THE CASE

A. Summary of Material Facts

Petitioners are retired state officials who held statewide constitutional offices in California.[1] Petitioners, or their benefactors, first assumed office prior to October 7, 1974. All petitioners are receiving pension allowances from the California Legislators' Retirement System ("LRS") which is administered by respondent Board of Administration of the Public Employees Retirement System (hereinafter "Board") and governed pursuant to the Legislators' Retirement Law ("LRL"). (Gov. Code, §§ 9350-9378.)[2]

Prior to November 4, 1986, petitioners' retirement allowances were subject to periodic increases based on two cost-of-living factors. The first factor was the current salary for the office the retiree last held. The second

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[1] Petitioner Knight is the widow of a former governor of California and is his pension beneficiary.

[2] All statutory references are to the Government Code, unless otherwise indicated.

factor was the consumer price index using a base year of 1954.

In 1974, the LRL was amended to eliminate the link between retirement benefits and incumbents' salaries for constitutional officers who took office on or after October 7, 1974. The pension of a retired constitutional officer, or his beneficiary, who took office on or after 1974 is based on the highest salary he or she received while in office, and does not increase each time the salary of the office increases. (§ 9359.1(b).)

Since the 1974 amendment applied only to constitutional officers taking office on or after October 7, 1974, the pensions of petitioners and of other constitutional officers who first assumed office prior to 1974 continued to increase exponentially whenever incumbents' salaries increase and when changes occurred in the consumer price index.

In November 4, 1986, the California electorate passed Proposition 57, which, by adding Article III, section 7 to the California Constitution, prevented any future increases in petitioners' retirement allowances resulting from increases in the salaries of incumbent officeholders. Article III, section 7 of the California Constitution provides in part that the pensions of the persons to whom it applies:

> " . . . shall not be increased or affected in any manner by changes on or after *November 5, 1986,* in the compensation payable to the officer holding the office which the member last held prior to retirement." (Emphasis added.)

After the passage of Proposition 57, respondent Board determined and notified petitioners that Article III, section 7, governed the calculation of their pension benefits.[3]

B. Summary Of Procedural History

On or about November 30, 1988, in action number 3 Civil C005622, petitioners Houston I. Flournoy and Harold J. Powers petitioned the Court of Appeal of the State of California, Third Appellate District, to exercise its original jurisdiction and issue an alternative writ of mandate directing the Board of Administration of the Public Employees Retirement System to show cause why their retirement allowances should not be calculated without regard to Proposition 57.

Respondent Board of Administration opposed the petition on the merits but did not oppose the Court of Appeal exercising its original jurisdiction over the matter.

The Court issued the alternative writ and on March 3, 1989, respondent Board filed its Return to the writ.

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[3] In 1986, petitioner Knight's annual pension was $26,858. If Article III, section 7, were not applied to her, her 1987 annual pension would have been $46,494. The comparable figures for petitioner Brown are $62,314 and $107,880; petitioner Riles $17,710 and $22,764; petitioner Flournoy $42,500 and $101,858 and petitioner Powers $59,024 and $100,692. The amount of petitioner Nevins' pension is not a matter of record in this action.

In 1990 there was an additional increase in the salaries of constitutional officers.

On or about January 20, 1989, in action number 3 Civil C005934, petitioners Knight, Brown, Riles and Nevins petitioned the Court of Appeal of the State of California for an original writ of mandate directing respondent to show cause why their retirement allowances should not be calculated without regard to Proposition 57. The Court issued the alternative writ and on March 3, 1989 respondent filed its return to the writ.

On September 27, 1989, in a letter to counsel, the Court of Appeal requested supplemental briefing to address the question whether, in view of the unique and express refusal prior to January 1, 1978 of the Legislature to appropriate funds to support the LRL, the petitioners could have acquired contractual rights, protected by the Contract Clause of the Federal Constitution, to have their retirement benefits calculated according to a specific formula. Thereafter the parties filed supplemental briefs.

On September 4, 1990, the Court of Appeal ordered the two cases consolidated for decision and issued a published opinion denying the petitions (Appendix A to petition).

The petitioners filed a petition for rehearing which the Court of Appeal denied on October 1, 1990.

The petitioners requested review in the California Supreme Court. On December 20, 1990, the California Supreme Court denied the petition for review but directed that the decision of the Court of Appeal not be published in the Official Appellate Reports of the State of California.

REASONS WHY THE WRIT SHOULD BE DENIED

I

CERTIORARI SHOULD BE DENIED BECAUSE ARTICLE III, SECTION 7 DOES NOT VIOLATE THE CONTRACT CLAUSE OF THE FEDERAL CONSTITUTION

Petitioners contend that certiorari must be granted because Article III, section 7 of the California Constitution destroys, in violation of the Contract Clause of the United States Constitution, their vested contract right to have their pension benefits increased whenever the salary of incumbent officeholders is increased. There is no merit in this contention.

Article I, section 10, clause 1 of the federal constitution provides in part: "No state shall . . . pass any . . . law impairing the obligation of contracts, . . . " This clause prohibits a state from impairing, by legislation, the obligation of its own contracts, as well as the obligation of the contracts of individuals. (*Woodruff* v. *Trapnall* 51 U.S. (10 How.) 190, 206 (1850).) A provision of a state constitution may be a "law" within the meaning of the contract clause. (*Bier* v. *McGehee* 148 U.S. 137, 140 (1893).)

1. Under California Law Petitioners Did Not Have a Vested Right to Have Their Retirement Allowance Calculated Pursuant to a Particular Formula.

In this, as in most cases brought under the Contract Clause, the question of whether there has been an unconstitutional impairment of a contract is resolved by determining whether the allegedly impaired contract right actually exists, and if so, by determining the nature of

this right, rather than upon a construction of the law which is said to impair it. (*Indiana* ex rel. *Anderson* v. *Brand* 303 U.S. 95, 100 (1938) [82 L.Ed. 685, 690, 58 S.Ct. 443, 113 A.L.R. 1482].) The determination whether a contract exists, and its meaning, require reference to state law. (*Ibid.*)

When presented with a claim that a statutory scheme has created a contract, this Court exercises independent judgment as to both the existence and meaning of the contract; however, in doing so, this Court grants great deference to the decision of the highest state court which considered the matter unless that decision is "palpably erroneous" or "manifestly wrong." (*Hale* v. *State Board* 302 U.S. 95, 101 (1937) [82 L.Ed. 72, 76, 585 S.Ct. 102]; *Phelps* v. *Board of Education* 300 U.S. 319, 322-323 (1937) [81 L.Ed. 674, 677, 57 S.Ct. 483].) Only when both the existence of a contract and its terms have been determined by reference to state law, may there be a determination whether a subsequently enacted state law constitutes an impermissible impairment of contract under the federal constitution.

The opinion of the Court of Appeal contains an exhaustive legislative history of the LRL from its inception until the passage of Proposition 57 (Appendix A, pp. 6a-44a). This legislative history reveals that it was not until 1977 when Government Code section 9358 was amended to provide for a continuing appropriation to the LRL and Government Code section 9358.1 was repealed that the Legislature bound the State of California's spending power to fund the LRL (Appendix A, pp. 28a-29a).

The Court of Appeal concluded that the import of this refusal to bind the State to fund the LRL is that, although the petitioners had a right to reasonable or substantial pension benefits, they did not have a vested right to have their pension benefits calculated according to a specific formula (Appendix A, pp. 70a-115a). This latter conclusion was reached only after a thorough and exhaustive review of applicable state authorities. Petitioners have not demonstrated that the decision of the Court of Appeal on their pension benefit rights under California law is palpably erroneous.

2. Petitioners Have Not Overcome the Presumption That They Have No Vested Right in Having Their Retirement Allowance Calculated Pursuant To a Particular Formula.

While it is beyond dispute that a state can, through a statutory scheme, create contractual rights which may not be impaired by subsequent legislation (*Indiana* ex rel. *Anderson* v. *Brand, supra,* 303 U.S. at 100 [82 L.Ed. at 690-691]), in cases litigated under the Contract Clause, it is presumed that a statutory scheme does not create constitutionally protected contract rights. For as this Court has observed, "[t]he principal function of a legislative body is not to make contracts but to make laws which declare the policy of the state and are subject to repeal when a subsequent legislature shall determine to alter that policy." (*Ibid.*)

Since *it is presumed that a statutory scheme is not intended to create private contractual or vested rights* petitioners as the parties asserting the creation of a contract

with the state had the burden of overcoming that presumption. (*Dodge* v. *Board of Education* 302 U.S. 74, 78-79 (1937) [82 L.Ed. 57, 62, 58 S.Ct. 98].)

Petitioners simply cannot overcome the historical evidence that the California Legislature never intended to bind the spending power of the state to a particular formula for the calculation of their retirement benefits. The inescapable conclusion is that they have failed to meet their burden to overcome the presumption that in enacting the LRL the California Legislature did not intend to grant them private contractual right to have their retirement allowances calculated according to a particular formula.

3. Assuming For Argument's Sake That Petitioners Have Vested Rights That Have Been Impaired, the Alleged Impairment is Not Unconstitutional.

Assuming that petitioners have vested rights protected by the Contract Clause and that Proposition 57 impairs these rights, there is no basis for a finding that Proposition 57 violates the Contract Clause. This Court has determined that not every impairment of a contract violates the contract clause. Thus, "the impairment provision does not prevent laws which restrict a party to the gains 'reasonably to be expected from the contract.' Constitutional decisions 'have never given a law which imposes unforeseen advantages or burdens on a contracting party constitutional immunity against change.' " *City of El Paso* v. *Simmons* 379 U.S. 497 (1965) at p. 515. And "the reservation of essential attributes of sovereign power is also read into contracts as a postulate of the legal

order." (*Home Building & Loan Asso.* v. *Blaisdell* 290 U.S. 398, 435 (1933).)

Assuming petitioners had vested contractual rights to their retirement benefits, Proposition 57 still did not result in an unconstitutional impairment of these rights because it allows them to retain substantial and reasonably foreseeable pension benefits. Proposition 57 only eliminated unforeseen windfall benefits that would have left petitioners with benefits in excess of the salaries of incumbent office holders (see Appendix A, pp. 33a-41a). This does not amount to an unconstitutional impairment of contract rights. *City of El Paso* v. *Simmons, supra,* 379 U.S. at 515.

II

CERTIORARI SHOULD BE DENIED BECAUSE THE PETITION DOES NOT PRESENT SUBSTANTIAL FEDERAL QUESTIONS

While the constitutional issues presented in the Petition for Certiorari are federal questions in the strict sense, in light of the weight of precedent of this Court, the issues clearly are without merit and insubstantial. Additionally, many of the points raised in the petition do not present this Court with federal questions but instead request this Court to resolve matters of state law contrary to the clear precedent of the California Supreme Court and Court of Appeal.

Since the petition presents this Court with claims that are so attenuated and unsubstantial as to be devoid of merit, this Court should decline to entertain jurisdiction. Cf. *Hagans* v. *Lavine* 415 U.S. 528, 536-37 (1974).

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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